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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NADER ESHAGHIAN, Defendant and Appellant.	B223067 (Los Angeles County Super. Ct. No. BA351612)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald H. Rose, Judge. Affirmed.

Richard Schwartzberg for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Baine P. Kerr, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Nader Eshaghian guilty of assault with a deadly weapon and he was sentenced to a total term of 12 years, having rejected a pretrial offer of three years. Eshaghian now contends that had his attorney properly advised him on the law of assault—namely, that he could be found guilty of assault even though he did not touch the victim—he would have accepted the offer. We hold that the trial court did not err in finding that Eshaghian's trial counsel was competent, and we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.[1]

Brandon Moore and Lucio Erik Casillas were security officers at the Commerce Casino, where Eshaghian had come to gamble. On the evening of January 6, 2009, Casillas told Eshaghian he was illegally parked in the casino's lot. Upset, Eshaghian drove his car at a high rate of speed, ignoring stop signs, and parked. Casillas and Moore told Eshaghian to leave. Angry, Eshaghian initially refused to go, but Moore said that if he didn't leave he would be arrested for trespassing. Eshaghian walked to the parking lot, followed by Moore and another security officer, Carlos Morales. While they were walking out, Eshaghian threatened to stab Morales.

Eshaghian got into his car and began to drive away. Casillas, who was wearing his security officer uniform, was in the parking lot. Eshaghian accelerated and veered towards him. Believing that Eshaghian was going to hit him with the car, Casillas jumped out of the way, and Eshaghian left. Eshaghian's car did not touch Casillas.

II. Procedural background.

Trial was by jury. On August 4, 2009, the jury found Eshaghian guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).[2] Before he was sentenced,

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[1] Because a detailed set of facts is not necessary to the issue on review, we briefly state them.

[2] All further statutory references are to the Penal Code.

Eshaghian, represented by new counsel, filed a motion for a new trial based on ineffective assistance of his prior counsel. Finding no evidence that prior counsel did not understand the law and finding that he was competent throughout the trial, the court denied the motion. The court therefore, on January 21, 2009, sentenced Eshaghian to the midterm of three years, doubled under the Three Strikes law to six years. The court imposed a consecutive one-year term under section 667.5, subdivision (b), and a consecutive five-year term under section 667, subdivision (a)(1). The total sentence was 12 years.

DISCUSSION

III. The trial court did not abuse its discretion by denying the motion for a new trial.

Eshaghian contends that the trial court erred by denying his motion for a new trial, which was based on his trial counsel's, Mark Bledstein, alleged misadvisement there could be no assault in the absence of a touching. Eshaghian argues that had he known he could be found guilty of assault even if he didn't intend to hit the victim, he would have accepted the pretrial offer of three years.

A. *Additional facts.*

Eshaghian was charged with assault with a deadly weapon, with a prior strike conviction under the Three Strikes law and prior convictions under sections 667, subdivision (a)(1), and 667.5, subdivision (b). At a pretrial hearing the trial court warned Eshaghian that his total exposure was 14 years. The prosecutor said that an offer of three years had been made, but was "now off the table." Defense counsel agreed, "There has been a 3-year offer on the table for a long time which my client—which would be a half-time situation. My client has not been interested in that—in that offer. . . . And at this point, my client indicates that he's not interested in an offer, I believe. [¶] Is that correct, Mr. Eshaghian?" Eshaghian replied, "I haven't done nothing." The court, in some detail and at length, explained to Eshaghian what was the maximum sentence and that the three-year offer was considerably less than that. The court asked Eshaghian if he understood

the offer, thought about it, and spoken to his attorney about it. Eshaghian responded to these inquiries in the affirmative and said, "I'm rejecting the offer, Your Honor."

Thereafter, Eshaghian made two *Marsden*[3] motions. At the first *Marsden* hearing, Eshaghian explained that he disagreed with his counsel's trial tactics, in particular how witnesses were cross-examined, and he complained that Bledstein was asking for money. At the second *Marsden* hearing, Eshaghian said that his trial counsel never went to see him at jail and was unprepared. The trial court denied both motions, stating at the second hearing that Eshaghian had "no credibility whatsoever in regards to this issue. It appears to me that it is an attempt on his part to derail this trial. [¶] . . . [¶] We simply have a defendant who needs to be in control of every little detail and when he can't get his way, he loses his temper and acts out."

After the jury found him guilty, Eshaghian hired a new attorney, who prepared a motion for a new trial. In a declaration submitted in support of the motion, Eshaghian said, "Mr. Bledstein told me that the prosecutor had offered a guilty plea that would result in a sentence of [three] years in state prison at 'half time,' but that he was still trying to get a misdemeanor offer. He told me not to worry, that the case was 'bullshit.' He said I did not have to take the offer, and that he did not think I should take it. He said that when we got to Department 100 for assignment to a trial court, the prosecutor would make a better offer." Mr. Bledstein also repeatedly advised him that the prosecutor had to prove Eshaghian intended to hit Casillas with the car. "He told me that since I had not actually hit Mr. Casillas, I had a strong argument that I lacked criminal intent. I knew I did not intend to hit or injure Mr. Casillas, so I did not think I could be found guilty. He also told me 'They have no case, you are going to go home.' " Eshaghian also submitted the declaration of Ed Rucker, a criminal defense attorney, who offered the opinion that Bledstein's representation fell beneath the "standard of practice for criminal counsel in the Los Angeles legal community."

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

The trial court explained at length why it was denying the motion. The court noted that Bledstein was in a difficult position because it wasn't a case in which a clearly illegal act had occurred. Rather, according to the defense theory of the case, Eshaghian was simply doing a legal act, driving a car, and the victim happened to be walking nearby. The court also commented on Eshaghian's open display of anger during the trial, which made him "his own worst enemy." The court concluded that there was no evidence Bledstein did not understand the law and that he was competent throughout the entire case.

B. *The record fails to establish that Eshaghian's trial counsel did not understand the law of assault.*

"A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 524; see also, *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1251-1252.) A defendant is entitled to a new trial if he received ineffective assistance of counsel at trial. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1036.) "A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; and (2) . . . there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703, italics omitted; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Lopez* (2008) 42 Cal.4th 960, 966.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) A reviewing court presumes that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. " 'Defendant thus bears the burden of

establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) A reviewing court presumes that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.

The "review of counsel's performance is to be highly deferential. . . . 'Because of the difficulties inherent in making the evaluation [of counsel's tactical choices], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . .' [Citation.]" (*People v. Duncan* (1991) 53 Cal.3d 955, 966.)

Where counsel's ineffective representation results in a defendant's rejection of an offered plea bargain and in the defendant's decision to proceed to trial, a claim of ineffective assistance of counsel arises. (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) A trial counsel must accurately communicate the terms of an offer and inform the defendant of the consequences of rejecting it, including the maximum and minimum terms should a conviction occur. (*Id.* at p. 937.) But "a defense attorney's simple misjudgment as to the strength of the prosecution's case, the chances of acquittal, or the sentence a defendant is likely to receive upon conviction, among other matters involving the exercise of counsel's judgment, will not, without more, give rise to a claim of ineffective assistance of counsel." (*Ibid.*)

Notwithstanding Eshaghian's declaration here stating that had he received competent assistance he would have accepted the three-year offer, the record does not support a finding that his counsel provided ineffective assistance. "[A] defendant's self-

serving statement—after trial, conviction, and sentence—that with competent advice he or she would have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*In re Alvernaz, supra*, 2 Cal.4th at p. 938, italics omitted.)

The objective "evidence" Eshaghian cites to corroborate his claim he was misadvised are statements his trial counsel made. These statements, Eshaghian argues, show that his counsel was ignorant of the law on assault and, hence, misadvised him. That law is the mental state for assault is established by proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, that is, a battery. (*People v. Williams* (2001) 26 Cal.4th 779, 786.) It is a general intent crime; thus a specific intent to injure the victim is not required. (*Id.* at pp. 787-788.) "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Id.* at p. 788.) Proof of an actual touching, injury, or intent to injure is therefore not essential to support a conviction for assault with a deadly weapon. (*People v. Flores* (2007) 157 Cal.App.4th 216, 221.)

Here, Eshaghian's trial counsel made statements during his opening statement, the motion to dismiss, and in closing argument that, Eshaghian argues, show that Bledstein did not understand the law on assault:

First, in his opening argument, Bledstein said twice that there was no touching.

Second, while making a motion to dismiss at the close of the People's case, trial counsel argued "[t]here was no touching which I understand is not the—is just one factor. [¶] . . . [¶] My, feeling, based on the totality of the circumstances, is that the People's case is based on, you know, suspicion, speculation, conjecture, guesswork. There's no eye contact. We don't really know if . . . from the state of evidence, as I see it, whether

Mr. Eshaghian had an intent or didn't have an intent, was doing something at the time, was not doing something at the time."

Finally, in closing argument, defense counsel said, "The facts here are pretty unusual. There is no—there is no injury to anyone and yet you might find it a little unusual that he is charged with assault with a deadly weapon. There is no touching. The fact that there's no touching you can consider." "There's no touching. There's no evidence that Mr. Eshaghian even saw this man."

As the trial court found, trial counsel's repeated references to the lack of a touching or injury to the victim and to Eshaghian's lack of intent to hit the victim does not mean he failed to understand the correct elements of the crime of assault with a deadly weapon. Rather, placed in context, trial counsel was arguing that the People had not satisfied their burden of proof, because there was no evidence that Eshaghian saw the victim, which is presumably why defense counsel repeatedly noted that the victim did not testify he and Eshaghian made eye contact. Eshaghian was simply engaged in the legal act of driving. That there was no touching supported the defense theory that Eshaghian was just driving his car and never saw the victim. Also, the record shows that defense counsel did know that touching was not an element of the crime, because he referenced that it was "just one factor" while arguing the motion to dismiss. Moreover, as the Attorney General points out, that a touching was not an element of the crime does not mean it was an irrelevant fact. That the victim was not touched or harmed, as we have said, was relevant evidence and trial counsel might have thought it made Eshaghian a more sympathetic defendant.

We also note that the trial court, at some length, discussed the three-year offer with Eshaghian and explained that his maximum exposure was 14 years. Eshaghian personally said that he understood everything the court said, but he rejected the offer. Where, as here, the record shows that the defendant was properly advised about the maximum sentence and the consequences of rejecting the plea offer and where there is no objective evidence showing that trial counsel misadvised the defendant about that

offer, we find no error in denying the motion for a new trial based on ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.